No. 21,819

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

GEORGE L. SANFORD,

Appellant,

v.

UNITED STATES OF AMERICA and
UNITED STATES ARMY, ET AL.,

Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF WASHINGTON

BRIEF FOR APPELLEES

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I N D E X

CITATIONS

Cases:

Statutes:

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JURISDICTIONAL STATEMENT

This action was brought by appellant in the United States District Court for the Eastern District of Washington seeking review of the decision of the Administrator of Veterans' Affairs denying disability benefits to appellant, and seeking review of the decision of the Army Board for Correction of Military Records denying changes requested by appellant in his records (1 R. 1-3,

7-8). The Government moved to dismiss the complaint on the basis of 38 U.S.C. 211(a) and 10 U.S.C. 1552 (1 R. 16-19, 30-32). [1] The district court granted the motion and dismissed the complaint (1 R. 61).

The jurisdiction of this Court rests upon 28 U.S.C. 1291.

STATUTES INVOLVED

10 U.S.C. 1552(a) and (b):

> (a) The Secretary of a military department, under procedures established by him and approved by the Secretary of Defense, and acting through boards of civilians of the executive part of that military department, may correct any military record of that department when he considers it necessary to correct an error or remove an injustice. * * * Except when procured by fraud, a correction under this section is final and conclusive on all officers of the United States.
>
> (b) No correction may be made under subsection (a) unless the claimant or his heir or legal representative files a request therefor before October 26, 1961, or within three years after he discovers the error or injustice, whichever is later. However, a board established under subsection (a) may excuse a failure to file within three years after discovery if it finds it to be in the interest of justice.

38 U.S.C. 211(a):

> Except as provided in sections 775, 784, 1661, 1761, and as to matters arising under chapter 37 of this title, the decisions of the [Veterans] Administrator on any question of law or fact concerning a claim for benefits or payments under any law administered by the Veterans' Administration shall be final and conclusive and no other official or any

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1/ The Government further noted that neither the United States Army nor the Veterans Administration are suable entities (1 R. 19).

court of the United States shall have power or jurisdiction to review any such decision. 2/

COUNTERSTATEMENT OF THE CASE

1. Appellant seeks review of determinations by the Army Board for Correction of Military Records and by the Administrator of Veterans Affairs (1 R. 2-3, 8) with respect to appellant's claim for service-connected disability benefits. The allegations of the complaint (as elaborated upon in briefs filed by appellant in the district court) may be summarized as follows: 3/

On December 14 and 15, 1942, while serving in the Army at Fort Douglas, Utah, appellant, together with other servicemen, suffered "acute-moderate" diarrhea. No hospitalization was afforded, and all were shipped out to further training at Camp Howze, Texas (1 R. 1, 36, 43, 45).

On July 4, 1943, while training at Camp Howze on an infiltration course under machine gun fire, appellant "froze" and was carried off the course (1 R. 1, 36, 47-49, 51). He was examined by medical personnel and sent back to his quarters (1 R. 49).

2/ None of the express exceptions to administrative finality contained in this Section are applicable here. Sections 775 and 784 relate to suits on insurance policies. Sections 1661 and 1761 permit audit and review by the General Accounting Office of payments made in connection with education and vocation programs. Chapter 37 relates to home, farm and business loans.

3/ Appellant's complaint in the instant action specifically incorporated his complaint in an earlier action (1 R. 7). That action (No. 2041, E.D. Wash.) was dismissed (1 R. 6).

Four months later, on November 19, 1943, appellant was transferred to another unit, with "some" other men not considered physically fit for combat (1 R. 1-2, 36, 47-49, 51, 55). At the new unit, on November 23, 1943, a psychiatrist interrogated appellant concerning the incident on the infiltration course and as to whether there had been any like incident in civilian life and, upon appellant's reply in the negative, stated, according to appellant, that for appellant's own good he would destroy the record, and did so (1 R. 1, 36, 47).

Appellant thereafter carried on his duties satisfactorily, including fully active overseas service from May 1944 to June 1945. Absence from duty on November 23, 1943, and February 1, 1944, was followed by return to duty on the same date on each occasion. 1 R. 54, 56-57. 4/

In 1955 appellant filed a claim for service-connected disability with the Veterans Administration. In denying the claim, the VA noted appellant's allegations of an onset of nervousness while on the infiltration course, but concluded that there was no finding or treatment of nervous disorder during his military service (1 R. 2, 8, 36-37).

On March 27, 1965, appellant filed with the Army Board for Correction of Military Records an application for the correction of his military records to reflect that he had been transferred from Fort Douglas to Camp Howze in a "sick condition"

4/ Cf. a neighbor's letter ascribing appellant's "nervous breakdown" of the winter of 1949-1950, not only to war service but to the care of his ill mother and the burden of marriage and supporting two children (1 R. 60).

and that he had sustained a "paralysis injury" on the infiltration course at the latter installation (1 R. 7-8; and see 1 R. 17). On June 23, 1965, the Board determined that insufficient evidence had been presented to indicate probable material error or injustice (see 1 R. 20). The Board concluded, inter alia, that there was insufficient material evidence to support appellant's contention that he had suffered a "paralysis" on the infiltration course (1 R. 10).

2. The Government moved for dismissal of appellant's complaint on the basis that the complaint was in essence a claim for disability benefits which the Veterans Administrator has denied, and that 38 U.S.C. 211(a) categorically provides that "no other official or any court of the United States shall have power or jurisdiction to review any such decision" (1 R. 17). Additionally, it was urged that in light of appellant's long subsequent history of full duty, including combat duty overseas from May 1944 to June 1945, the Board was manifestly not arbitrary in refusing to change appellant's military records to attribute disabling consequences to the 1942 attack of diarrhea and the 1943 incident on the infiltration course (1 R. 30-32).

3. On February 24, 1967, upon written and oral arguments (3 R. 1-28), the district court granted the Government's motion to dismiss (1 R. 61). On March 23, 1967, appellant filed notice of appeal (1 R. 62).

ARGUMENT

THE DISTRICT COURT PROPERLY DISMISSED APPELLANT'S ACTION TO REVIEW DENIAL OF DISABILITY BENEFITS BY THE VETERANS ADMINISTRATOR AND TO REQUIRE THE ARMY BOARD TO CHANGE APPELLANT'S MILITARY RECORDS.

38 U.S.C. 211(a), supra, pp. 2-3, provides, with exceptions not here relevant, that the decisions of the Veterans Administrator "on any question of law or fact concerning a claim for [veterans] benefits or payments * * * shall be final and conclusive." The Section goes on to stipulate that no "court of the United States shall have power or jurisdiction to review any such decision." As this Court recently held in Redfield v. Driver, Administrator, 364 F. 2d 812, 813, this means precisely what it says: "There is no jurisdiction in the court below, or here, to review a final action of the [Veterans] Administrator."

Section 211(a) plainly is applicable here. In the final analysis, it is clear that appellant's objective is to upset the determination of the Veterans Administrator that he is not entitled to disability benefits based upon two isolated occurrences during his extensive (1942-1946) World War II military service; e.g., his brief bout with diarrhea at Fort Douglas in December 1942 and the equally brief "freezing" incident when he was under machine gun fire on the infiltration course at Camp Howze in July 1943.

Appellant's endeavor to obtain judicial review of the denial of disability benefits is not furthered by his focus upon the refusal of the Army Board for the Correction of Military Records to

act favorably upon his application to have changes made in his records which would support his service-connected disability claim. For one thing, appellant should not be permitted to obtain indirectly that which he is precluded by 38 U.S.C. 211(a) from obtaining directly; i.e., review of the Veterans' Administrator's denial of disability benefits under the guise of seeking review of the refusal of the Army Board to alter his military records. In any event, it is clear that the Board's action was fully justified. It is an indisputable fact that, following the two occurrences upon which appellant bases his claim of a service-connected disability, appellant not only completed his training period but then served overseas in a combat area from May 1944 to June 1945 (1 R. 56). During this service he was, according to his commanding officer, a soldier who "carried on all his duties in a very satisfactory manner" (1 R. 56). In these circumstances, it is scarcely surprising that the Army Board decided that the two transitory occurrences at an early stage of appellant's military career did not require an alteration in his military records "to correct an error or to remove an injustice." 10 U.S.C. 1552, supra, p. 2. Stated otherwise, the Board could certainly conclude that appellant's insistence that he had become disabled as a result of an alleged "acute illness" in 1942 and "paralysis injury" in 1943 was wholly refuted by the fact that -- for several years thereafter -- he fully discharged his military responsibilities without disabling physical or psychological impairment.

Since the Army Board's determination was -- at the very least -- not arbitrary, it is conclusive here. It is, of course,

not the function of the courts to review the weight of the evidence before the Board or to substitute its judgment for that of the Board with respect to whether the correction of a military record is warranted. See Stephens v. United States, 358 F. 2d 951, 954 (C. Cls.). 5/

CONCLUSION

For the foregoing reasons, we submit that the judgment of the district court should be affirmed.

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5/ Appellant's charge (Br. p. 18) that there was a "fraudulent * * * destruction and misuse" of his medical records by Army doctors is entirely without foundation. As previously indicated, appellant alleges that an Army psychiatrist destroyed (several months after the event) the record of the occurrence on the infiltration course. But even according to appellant, the doctor took the action only after he had apparently satisfied himself -- on the basis of his interrogation of appellant -- that this was an isolated incident of no prospective importance and that appellant would benefit from its deletion from his service record. Apart from the fact that the medical judgment of the psychiatrist was not proven wrong during appellant's subsequent military career, there is absolutely nothing to indicate that there was any other motivation for his action -- let alone a fraudulent purpose.

CERTIFICATE

I certify that, in connection with the preparation of this brief, I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

J. F. Bishop

J. F. BISHOP
Attorney.

AFFIDAVIT OF SERVICE

WASHINGTON)
) ss.
DSITRICT OF COLUMBIA)

J. F. Bishop, being duly sworn, deposes and says:

That on July 13, 1967, he caused three copies of the above brief to be served by the United States mails, in a franked envelope addressed as follows, to appellant, who is proceeding pro se:

Mr. George L. Sanford
424 South 35 Avenue
Yakima, Washington 98902

J. F. BISHOP
Attorney,
Department of Justice,
Washington, D. C. 20530.

Subscribed and sworn to before
me this 13th day of July, 1967.

NOTARY PUBLIC

My commission expires April 14, 1972.